

### Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

### Comment to 2012 Amendment

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gate keeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony.

This comment has been derived, in part, from the Committee Notes on Rules—2000 Amendment to Federal Rule of Evidence 702.

### Cases

702.010 Expert testimony based on the witness's own experience, observation, and study, and the witness's own research and that of others, is admissible if (1) the witness is qualified as an expert, and (2) the testimony will aid the jurors to understand the evidence or to determine a fact in issue; for such evidence, there is no requirement that the trial court undergo a reliability analysis.

*Logerquist v. McVey (Danforth)*, 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not about some scientific principle, court held trial court erred in applying "generally accepted" standard to this testimony).

*State v. Lee(II)*, 189 Ariz. 608, 944 P.2d 1222 (1997) (court concluded that detective's expert testimony on blood-spatter did not contradict opinion of medical examiner, thus rejected defendant's claim that detective's testimony was not reliable; because testimony helped jurors understand sequence of shots, and detective's non-inflammatory language was not unfairly prejudicial, testimony was admissible).

## ARIZONA EVIDENCE REPORTER

*Lear v. Fields*, 226 Ariz. 226, 245 P.3d 911, ¶¶ 14–22 (Ct. App. 2011) (A.R.S. § 12-2203 (Arizona *Daubert*) does not alter any substantive law, but instead is attempt to control admissibility of expert witness testimony in all cases and such controls procedural matters; because it conflicts with existing rules of evidence, it is unconstitutional).

*Pipher v. Loo*, 221 Ariz. 399, 212 P.3d 91, ¶¶ 16–18 (Ct. App. 2009) (expert witness testified he was board certified with 35 years' experience, had administered thousands of injections of type at issue, and had number of patients with type of injury at issue; trial court precluded expert's testimony because it concluded testimony lacked foundation, was speculative, and lacked adequate basis under Rules 702 and 703; court held trial court erred in excluding this testimony and remanded for new trial).

*Lohmeier v. Hammer*, 214 Ariz. 57, 148 P.3d 101, ¶¶ 36–48 (Ct. App. 2006) (expert witness was biomechanical engineer, and based on his own training and experimentation and on works of others, testified that rear-end collision did not cause plaintiff's injuries; court held trial court did not err allowing expert witness to testify).

*State v. Speers*, 209 Ariz. 125, 98 P.3d 560, ¶¶ 14–16 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that, because propensity evidence testimony was relevant, testimony from expert witness about suggestive interview techniques was also relevant, thus trial court erred in precluding this evidence).

702.020 Expert testimony based on a novel scientific principle, formula, technique, or procedure developed or advanced by others is admissible if (1) the witness is qualified as an expert, (2) the testimony will aid the jurors to understand the evidence or to determine a fact in issue, and (3) the scientific principle, formula, technique, or procedure has gained general acceptance in the particular scientific field in which it belongs.

*Logerquist v. McVey (Danforth)*, 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 47, 53, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not testimony about some scientific principle, court held trial court erred in applying “generally accepted” standard to this testimony).

*Lear v. Fields*, 226 Ariz. 226, 245 P.3d 911, ¶¶ 14–22 (Ct. App. 2011) (A.R.S. § 12-2203 (Arizona *Daubert*) does not alter any substantive law, but instead is attempt to control admissibility of expert witness testimony in all cases and such controls procedural matters; because it conflicts with existing rules of evidence, it is unconstitutional).

702.030 Expert opinion testimony is admissible if it will assist the trier-of-fact to understand the evidence or to determine a fact in issue.

*In re Estate of Pouser*, 193 Ariz. 574, 975 P.2d 704, ¶¶ 15 (1999) (outcome of will contest depended on application of “transitional rule,” which related to wills drafted prior to changes in federal tax statutes; testimony of tax attorney of effect of federal statutes was thus admissible).

- \* *State v. Sosnowicz*, 229 Ariz. 90, 270 P.3d 917, ¶¶ 15–26 (Ct. App. 2012) (defendant drove his vehicle over victim, and claimed it was accident; state claimed defendant either intentionally, knowingly, or recklessly drove over victim; medical examiner testified manner of death was

## OPINION AND EXPERT TESTIMONY

homicide; because medical examiner's opinion was based on information he had received from police officers and not on any specialized knowledge or personal examination of body, court held that testimony essentially was ultimate issue in case and did not assist jurors in determining case, thus trial court should not have admitted that testimony, but any error was harmless).

*State v. Fornof*, 218 Ariz. 74, 179 P.3d 954, ¶¶ 20–21 (Ct. App. 2008) (officer testified that defendant had 43 grams of cocaine base that was worth \$4,360, cash in predominately \$20 bills, and no means of smoking that cocaine; trial court did not err in allowing expert witness to testify based on that evidence that defendant possessed the cocaine for sale rather than personal use).

*State v. Speers*, 209 Ariz. 125, 98 P.3d 560, ¶¶ 20–25 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that testimony from expert witness about suggestive interview techniques was admissible because it was subject about which lay juror may be unfamiliar, thus trial court erred in precluding this evidence).

*In re Ubaldo*, 206 Ariz. 543, 81 P.3d 334, ¶¶ 8–13 (Ct. App. 2003) (because charge of criminal damage under A.R.S. § 13–1602(A)(5) requires proof that defendant drew or inscribed marks that were capable of conveying some meaning, communication, or information, state may have to present expert to testify whether marks that defendant made were such that they conveyed some meaning, communication, or information).

*Hutcherson v. City of Phoenix*, 188 Ariz. 183, 933 P.2d 1251 (Ct. App. 1996) (victim was player for Phoenix Cardinals; in wrongful death action, sports agent properly permitted to give opinion of victim's potential earnings).

*State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (expert witness testified about generally shared characteristics of child sexual abuse victims, explaining such phenomena as secrecy, helplessness, coping mechanisms, response to abuse, and “script memory,” described familiar patterns of disclosure by victims to others, and described common techniques used by perpetrators to keep victims from disclosing abuse to others).

*State v. Carreon*, 151 Ariz. 615, 617, 729 P.2d 969, 971 (Ct. App. 1986) (police officer permitted to give opinion that, based on way that defendant carried cocaine and money, drugs were possessed for sale).

702.040 When a matter is of such common knowledge that a lay person could reach as intelligent a conclusion as an expert, the trial court should preclude expert opinion.

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶¶ 33–34 (2001) (sketch artist testified about eyewitness's description of suspect and satisfaction with resulting drawing; because sketch artist was no more qualified than jurors in determining whether eyewitness's description of suspect matched defendant's photograph, trial court properly precluded that testimony).

*Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 92 P.3d 882, ¶ 44 (Ct. App. 2004) (because jurors are capable of determining whether legal process has been used to pursue improper purpose, expert testimony is not required).

## ARIZONA EVIDENCE REPORTER

702.050 A witness may qualify as an expert on the basis of training and education.

- \* *Escamilla v. Cuello*, 230 Ariz. 202, 282 P.3d 403, ¶¶ 18–23 (Ct. App. 2012) (expert witness testified candidate did not have sufficient English language proficiency to fulfill duties as member of city council; candidate contested expert witness's qualifications; court reviewed expert witness's training education, knowledge, experience, and testing methods, and concluded trial court did not abuse discretion in admitting expert witness's testimony).

*State v. Lee(II)*, 189 Ariz. 608, 944 P.2d 1222 (1997) (officer had 21 years with department and 15 years as homicide detective, training in ballistics and reconstruction of human remains, courses at FBI Forensic Art School and composite art, and introductory and advanced courses in blood spatter; trial court did not abuse discretion in finding detective qualified as blood-spatter expert).

*State v. Hughes*, 189 Ariz. 62, 938 P.2d 457 (1997) (witness had been in Army for 25 years, and had received training in Vietnam and military interrogations schools; trial court did not err in determining witness qualified as expert in restraint methods).

*State v. Speers*, 209 Ariz. 125, 98 P.3d 560, ¶ 15 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that expert witness had necessary qualification to testify as expert about suggestive interview techniques, thus trial court erred in precluding this evidence).

*State v. Scott*, 187 Ariz. 474, 930 P.2d 551 (Ct. App. 1996) (criminalist permitted to testify about "green leafy substance" based on FBI and DEA training).

702.060 A witness may qualify as an expert on the basis of knowledge and experience.

- \* *Escamilla v. Cuello*, 230 Ariz. 202, 282 P.3d 403, ¶¶ 18–23 (Ct. App. 2012) (expert witness testified candidate did not have sufficient English language proficiency to fulfill duties as member of city council; candidate contested expert witness's qualifications; court reviewed expert witness's training education, knowledge, experience, and testing methods, and concluded trial court did not abuse discretion in admitting expert witness's testimony).

*State v. Davolt*, 207 Ariz. 191, 84 P.3d 456, ¶¶ 71–72 (2004) (because witness had been involved with DNA evidence since 1986 and had extensive training and experience in field, she was more qualified than ordinary juror, thus trial court did not abuse discretion in admitting her expert testimony).

*State v. Davolt*, 207 Ariz. 191, 84 P.3d 456, ¶¶ 73–75 (2004) (because detective had attended classes on crime scene management and homicide investigation, and had watched two videos on blood spatter analysis, his training, although not extensive, was more extensive than ordinary juror, thus trial court did not abuse discretion in admitting her expert testimony).

*State v. Lee(II)*, 189 Ariz. 608, 944 P.2d 1222 (1997) (officer had 21 years with department and 15 years as homicide detective, training in ballistics and reconstruction of human remains, courses at FBI Forensic Art School and composite art, and introductory and advanced courses in blood spatter; trial court did not abuse discretion in finding detective qualified as blood-spatter expert).

## OPINION AND EXPERT TESTIMONY

*State v. Hughes*, 189 Ariz. 62, 938 P.2d 457 (1997) (witness had been in Army for 25 years, worked in various capacities with prisoners and detainees, and had seen hundreds of people tied with ropes; trial court did not err in determining witness qualified as expert in restraint methods).

*State v. Speers*, 209 Ariz. 125, 98 P.3d 560, ¶ 15 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with them; court held that expert witness had necessary qualification to testify as expert about suggestive interview techniques, thus trial court erred in precluding this evidence).

*State v. Scott*, 187 Ariz. 474, 930 P.2d 551 (Ct. App. 1996) (criminalist permitted to testify about “green leafy substance” based on 14 years experience).

*State v. Riggs*, 186 Ariz. 573, 925 P.2d 714 (Ct. App. 1996) (*rev. granted* 10/21/96) (handwriting examiner’s opinion that signature on checks did not match defendant’s signature on signature card was based on her experience working in a bank).

702.065 When an expert testifies about what is the “standard of care,” that expert’s personal practices in that area may be relevant.

*Smethers v. Campion*, 210 Ariz. 167, 108 P.3d 946, ¶¶ 28–34 (Ct. App. 2005) (in medical malpractice action resulting from LASIK surgery, issue was whether standard of care required patient to stop wearing hard contact lenses for at least a month and then have measurements taken; expert testified that standard of care did not require that waiting period and that doctor could rely on measurements taken over the years; because medical literature suggested that standard of care did require waiting period, and because expert testified at trial that he would have done same thing as defendant in measuring without requiring waiting period, plaintiff should have been allowed to cross-examine expert about his deposition testimony wherein he said he personally would have waited before taking measurements).

702.070 The witness’s specialty affects the weight of the testimony and not its admissibility, thus the witness does not necessarily need to have the same specialty as the area that is the subject of the litigation.

*State v. Villalobos*, 225 Ariz. 74, 235 P.3d 227, ¶¶ 24–27 (2010) (medical examiner testified during aggravation stage that victim had suffered “excruciating” pain when defendant beat her; defendant contended medical examiner was not qualified to testify on subject of pain levels because he was certified only in pathology and had not ascertained a patient’s pain level for 10 years; court held these matters went to weight and not admissibility of testimony).

*Lohmeier v. Hammer*, 214 Ariz. 57, 148 P.3d 101, ¶¶ 26–29 (Ct. App. 2006) (expert witness was biomechanical engineer; plaintiff contended that, because expert witness was not medical doctor, had no medical training to diagnose injuries, and did not personally examine plaintiff, trial court should not have allowed expert witness to testify that rear-end collision did not cause plaintiff’s injuries; court held trial court did not err allowing expert witness to testify).

*Perguson v. Tamis*, 188 Ariz. 347, 937 P.2d 347 (Ct. App. 1996) (although Colorado expert witness acknowledged he was not familiar with standard of care applicable to physician assistants or their scope of practice in Arizona, because he was qualified to supervise physician assistant, he should have been allowed to give opinion whether physician assistant was negligent).

## ARIZONA EVIDENCE REPORTER

702.073 Under A.R.S. § 12-2602, if a claim against a licensed professional is asserted in a civil action, the claimant (or attorney) shall certify in a written statement filed and served with the claim whether or not expert opinion testimony is necessary to prove the licensed professional's standard of care or liability for the claim, and if the certification is that expert testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial Rule 26.1 disclosures.

*Hunter Contr. Co. v. Superior Ct.*, 190 Ariz. 318, 947 P.2d 892 (Ct. App. 1997) (to extent A.R.S. § 12-2602 limits type of expert for the required affidavit, statute is unconstitutional).

702.075 Under A.R.S. § 12-2603, if a claim against a health care professional is asserted in a civil action, the claimant (or attorney) shall certify in a written statement filed and served with the claim whether or not expert opinion testimony is necessary to prove the health care professional's standard of care or liability for the claim, and if the certification is that expert testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial Rule 26.1 disclosures.

- \* *Para v. Anderson*, 231 Ariz. 91, 290 P.3d 1214, ¶ 2 (Ct. App. 2012) (plaintiff sued multiple medical corporations and doctors for negligence and wrongful death, and named certain doctor as expert witness who would testify particular defendant doctor's treatment fell below standard of care).

702.077 Under A.R.S. § 12-2603, if the claimant certifies that expert opinion testimony is necessary to prove the health care professional's standard of care or liability for the claim and identifies the expert who will testify, that expert is subject to deposition, and if the party later re-designates that expert as a consulting expert, that expert is still subject to deposition, but any use of that expert's testimony at trial is subject to limitation under Rule 403.

- \* *Para v. Anderson*, 231 Ariz. 91, 290 P.3d 1214, ¶¶ 2-15 (Ct. App. 2012) (plaintiff sued multiple medical corporations and doctors for negligence and wrongful death, and named certain doctor as expert witness who would testify particular defendant doctor's treatment fell below standard of care; plaintiff settled with that particular defendant doctor, whereupon other defendants designated that particular defendant doctor as non-party at fault and sought to depose expert witness doctor; plaintiff filed notice purporting to name expert witness doctor as consulting expert only and sought to have trial court preclude deposition or other discovery; court held expert witness doctor was still subject to deposition and other discovery, but use of testimony at trial is subject to limitation under Rule 403).

702.080 A.R.S. § 12-2604 does not violate the Anti-Abrogation clause of the Arizona Constitution, does not violate right of access to courts, equal protection, or prohibition against special laws, and is therefore constitutional.

- \*\* *Baker v. University Physicians Health*, \_\_\_ Ariz. \_\_\_, 296 P.3d 42, ¶¶ 32-51 (2013) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology-oncology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; trial court determined defendant-physician was treating patient within specialized area of pediatric hematology-oncology; court held trial court did not abuse discretion in determining plaintiff's retained expert witness was not qualified to give testimony in relevant area of treatment).

## OPINION AND EXPERT TESTIMONY

*Governale v. Lieberman*, 226 Ariz. 443, 250 P.3d 220, ¶¶ 8–25 (Ct. App. 2011) (plaintiff contended defendant doctor committed medical malpractice during surgical procedure; defendant doctor was neurosurgeon; plaintiff's expert witness was board-certified anesthesiologist and pain management specialist; court held trial court properly granted defendant's motion for summary judgment because plaintiff's expert was not of same speciality as defendant doctor).

702.081 A.R.S. § 12–2604 applies in an action alleging medical malpractice, and thus applies to an action alleging medical malpractice under the Medical Malpractice Act (MMA), and to an action alleging medical malpractice under the Adult Protective Services Act (APSA).

- \* *Cornerstone Hosp. v. Marner*, 231 Ariz. 67, 290 P.3d 460, ¶¶ 10–28 (Ct. App. 2012) (decendent, who was vulnerable adult as defined by APSA, received treatment that fell below applicable standard of care; court held A.R.S. § 12–2604 applied, and concluded expert witness who was registered nurse (RN) was qualified to testify about standards of care for RNs, licensed practical nurses (LPN), and certified nursing assistants (CNA)).

702.082 If the party against whom the testimony is offered is or claims to be a specialist or board-certified specialist, then A.R.S. § 12–2604 requires that the expert witness must be a specialist or board-certified specialist, and this requirement applies whether or not the party against whom the testimony is offered was acting as a specialist at the time of the occurrence that is the basis for the action.

- \* *Cornerstone Hosp. v. Marner*, 231 Ariz. 67, 290 P.3d 460, ¶¶ 30–42 (Ct. App. 2012) (decendent, who was vulnerable adult as defined by APSA, received treatment that fell below applicable standard of care; court held A.R.S. § 12–2604 applied, and concluded expert witness who was registered nurse (RN) was qualified to testify about standards of care for RNs, licensed practical nurses (LPN), and certified nursing assistants (CNA)).

*Awsienko v. Cohen*, 227 Ariz. 256, 257 P.3d 175, ¶¶ 16–18 (Ct. App. 2011) (decendent suffered cardiac arrest and died; defendant Dr. H. was board-certified specialist in cardiovascular disease and interventional cardiology; plaintiffs contended their expert witness did not have to be board-certified specialist in cardiovascular disease or interventional cardiology because (1) Dr. H. never asserted he was acting as specialist at time of alleged malpractice and (2) their expert witness's opinions were unrelated to any cardiac treatment; court rejected plaintiffs' contention, noting that statute only requires that defendant be specialist or board-certified specialist).

702.084 Under A.R.S. § 12–2604, if the party against whom the testimony is offered is or claims to be a **specialist**, the witness offering testimony must specialize in the same specialty at the time of the **occurrence** that is the basis for the action, but if the party against whom the testimony is offered is or claims to be a **board-certified specialist**, the witness offering testimony must be board-certified specialist only at the time of the **proceedings**.

*Awsienko v. Cohen*, 227 Ariz. 256, 257 P.3d 175, ¶¶ 8–15 (Ct. App. 2011) (decendent died in 2006; defendant Dr. C. was board-certified in nephrology; plaintiff's expert witness was board-certified in nephrology in 2007; trial court granted motion for summary judgment because expert witness was not board-certified at time Dr. C. treated decendent; court reversed because expert witness was board-certified at time of proceedings).

702.086 A.R.S. § 12–2604(A) requires a testifying expert specialize in the same specialty or claimed specialty as the treating physician only when the care or treatment at issue was within that specialty, and that includes both specialties and sub-specialties.

## ARIZONA EVIDENCE REPORTER

- \*\* *Baker v. University Physicians Health*, \_\_\_ Ariz. \_\_\_, 296 P.3d 42, ¶¶ 11–14 (2013) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology-oncology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; trial court determined defendant-physician was treating patient within specialized area of pediatric hematology-oncology; court held trial court did not abuse discretion in determining plaintiff's retained expert witness was no qualified to give testimony in relevant area of treatment).
- \* *Baker v. University Physicians Health*, 228 Ariz. 587, 269 P.3d 1211, ¶¶ 4–15 (Ct. App. 2012), *vacated in part*, \_\_\_ Ariz. \_\_\_, 296 P.3d 42 (2013).
- \* *Lo v. Lee*, 230 Ariz. 457, 286 P.3d 801, ¶¶ 5–16 (Ct. App. 2012) (plaintiff brought suit against defendant doctor who had performed “laser facial skin treatment”; defendant doctor was board-certified ophthalmologist with claimed sub-specialty in oculoplastic surgery; plaintiff's standard-of-care expert was board-certified plastic surgeon; defendant doctor contended plaintiff's expert did not qualify because he was not an ophthalmologist; trial court considered defendant doctor specialist in cosmetic plastic surgery, and considered procedure he performed on plaintiff to fall under that specialty, and thus found plaintiff's board-certified plastic surgeon qualified as witness; on appeal, court noted ABMS description of ophthalmology included surgery, but did not include plastic surgery; defendant doctor acknowledged plastic surgeons performed facial laser resurfacing such as he performed on plaintiff, but contended that, because that procedure also is performed by ophthalmologists with his claimed sub-specialty in oculoplastic surgery, plaintiff was required to have ophthalmologist as expert witness, and thus plaintiff's standard-of-care expert did not qualify because he was not ophthalmologist; defendant doctor asserted he was not claiming specialty in plastic surgery, but was instead ophthalmologist performing cosmetic surgery; based on defendant doctor's claims on website, court concluded he claimed specialty in plastic surgery; court concluded that, when party had multiple specialties, testifying expert did not have to match all specialties and instead only had to match relevant specialty, and thus concluded relevant specialty here was plastic surgery, thus plaintiff's board-certified plastic surgeon satisfied statutory requirement).

702.088 Under A.R.S. § 12–2604, “specialty” refers to a limited area of medicine in which a physician is or may become certified, is not limited to the areas of medicine occupied by the 24 American Board of Medical Specialties member boards, and includes subspecialties; whether relevant “specialty” is area of general certification or subspecialty certification will depend on circumstances of particular case; “claimed specialty” refers to situations in which a physician purports to specialize in an area that is eligible for board certification, regardless of whether the physician in fact limits his or her practice to that area.

- \*\* *Baker v. University Physicians Health*, \_\_\_ Ariz. \_\_\_, 296 P.3d 42, ¶¶ 15–26 (2013) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology-oncology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; trial court determined defendant-physician was treating patient within specialized area of pediatric hematology-oncology; court held trial court did not abuse discretion in determining plaintiff's retained expert witness was no qualified to give testimony in relevant area of treatment).

## OPINION AND EXPERT TESTIMONY

702.089 In a case in which the treating physician is or claims to be a specialist requires a trial court to make several determinations: (1) The trial court must determine if the care or treatment at issue involves the identified specialty, which may include recognized subspecialties; (2) the trial court must then determine whether the treating physician is board certified, which may include recognized subspecialties; statute does not require testifying expert to have identical certifications as treating physician, but only that the expert be certified in the specialty at issue in the particular case.

\*\* *Baker v. University Physicians Health*, \_\_\_ Ariz. \_\_\_, 296 P.3d 42, ¶¶ 27–28 (2013) (court notes statute requires testifying expert to devote “majority” of his or her time in year immediately preceding occurrence to specialized area, and because physician cannot devote “majority” of time to more than one specialty, statute suggests only one relevant specialty need be matched).

702.090 To qualify as an expert, a witness need not have the highest possible qualifications or highest degree of skill or knowledge; all the witness need have is a skill or knowledge superior to that of persons in general, and the level of skill or knowledge affects the weight of the testimony and not its admissibility.

*State v. Davolt*, 207 Ariz. 191, 84 P.3d 456, ¶¶ 69–75 (2004) (because witness had been involved with DNA evidence since 1986 and had extensive training and experience in field, she was more qualified than ordinary juror, and because detective had attended classes on crime scene management and homicide investigation, and had watched two videos on blood spatter analysis, his training, although not extensive, was more extensive than ordinary juror, thus both were qualified as expert witnesses; the degree of qualification went to weight of testimony and not admissibility).

*Webb v. Omni Block Inc.*, 216 Ariz. 349, 166 P.3d 140, ¶¶ 7–10 (Ct. App. 2007) (plaintiff contended witness’s experience and training were not sufficient to qualify him as expert beyond responsibilities of general contractor, and thus he should not have been allowed to testify about duties and responsibilities of subcontractors; court found no error and stated degree of qualification went to weight and not admissibility of testimony).

*Perguson v. Tamis*, 188 Ariz. 347, 937 P.2d 347 (Ct. App. 1996) (although doctor expert witness from Colorado acknowledged he was not familiar with law or standard of care applicable to physician assistants or their scope of practice in Arizona, because he was qualified to supervise physician assistant, he should have been allowed to give opinion whether physician assistant was negligent, and any deficiencies would go to weight).

*State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (expert witness did not have to be licensed psychiatrist or psychologist to give opinion based on child sexual abuse accommodation syndrome).

702.100 When a party seeks to have a witness testify as an expert and the trial court determines that the witness so qualifies, the trial court should not declare in front of the jurors that the witness is an expert because this may give the appearance that the trial court is endorsing that witness’s testimony and may be considered a comment on the evidence.

*State v. McKinney & Hedlund*, 185 Ariz. 567, 585–86, 917 P.2d 1214, 1232–33 (1996) (after prosecutor elicited testimony about witness’s qualifications, prosecutor stated to trial court he was submitting witness as an expert, and trial court said prosecutor could proceed).

## ARIZONA EVIDENCE REPORTER

702.110 An accurate factual basis is a necessary element of a legally sufficient opinion.

*Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (in litigation over sale of bank, plaintiff-purchaser claimed \$23 million loss reserve figure supplied by defendant-seller understated amount of uncollectible loans; defendant-seller sought to introduce tax filing made by plaintiff-purchaser 1½ years after sale showing loss reserve of \$9.8 million; trial court excluded this evidence because defendant-seller's expert witness could not testify to what plaintiff-purchaser actually did in preparing tax filing and could only testify about what plaintiff-purchaser should have done; court held there was sufficient factual basis for evidence and thus it should have been admitted, and that any dispute about the \$9.8 million figure went to weight and not admissibility of opinion).

702.120 Ambiguities about the factual basis for an expert's opinion go to the weight and not the admissibility of the opinion.

*T.W.M. Custom Framing v. Industrial Comm'n*, 198 Ariz. 41, 6 P.2d 745, ¶¶ 18-20 (Ct. App. 2000) (decedent-employee committed suicide, and issue was whether decedent-employee's industrial injury so deprived him of normal judgment that his action in committing suicide would not be considered "purposeful" and thus would entitle his widow and child to collect death benefits; psychiatrist conducted psychiatric autopsy and testified that decedent's depressed mental condition resulted from his work-related injuries; employer contended that foundation for psychiatrist's testimony was inadequate because he relied on widow's testimony to formulate his opinions; court noted psychiatrist also relied medical records, police reports, and prior testimony, and concluded there was appropriate foundation for opinion).

*State v. Wells Fargo Bank*, 194 Ariz. 126, 978 P.2d 103, ¶ 31 (Ct. App. 1998) (plaintiff contended trial court erred in admitting expert opinion because expert did not perform specific study on economic impact of freeway on defendant's property; expert based opinion on materials published on subject, his prior appraisal studies, his own experience as urban economist, and inspection of area; court held that trial court properly admitted expert's opinion testimony).

*Souza v. Fred Carriers Contracts, Inc.*, 191 Ariz. 247, 955 P.2d 3 (Ct. App. 1997) (because vehicle had been destroyed, accident reconstruction expert was not able to examine it; court held that inspection of vehicle was not always necessary for opinion of how and why accident happened, and any shortcomings went to weight and not admissibility of opinion).

702.150 Meeting the statutory criteria is not the exclusive means of admitting breath test results in evidence, thus a party may have such evidence admitted if it complies with the rules of evidence pertaining to scientific evidence.

*State v. Superior Ct. (Pawlowicz)*, 195 Ariz. 555, 991 P.2d 258, ¶¶ 10-11 (Ct. App. 1999) (although state could not establish statutory foundation for admission of test results from Intoxilyzer 5000 ADAMS, trial court erred in suppressing test results without giving state opportunity to establish foundation under Arizona Rules of Evidence).

702.170 To withstand a motion for summary judgment or a motion for directed verdict in a malpractice action, unless the defendant's negligence is so grossly apparent that a lay person would have no difficulty recognizing the negligent conduct, the plaintiff must have evidence showing (1) the general standard of care in the particular area and under similar circumstances, (2) the defendant's performance fell below the applicable standard of care, and (3) these deviations from the standard of care proximately caused the claimed injury.

## OPINION AND EXPERT TESTIMONY

*Ryan v. San Francisco Peaks Truck. Co.*, 228 Ariz. 42, 262 P.3d 863, ¶¶ 19–40 (Ct. App. 2011) (court stated these requirements apply equally to defendant asserting that nonparty health care provider negligently caused or contributed to plaintiff's injury, and held defendant could use affidavits from plaintiff's experts in its claim that persons plaintiff had originally sued as defendants but with whom plaintiff had settled were non-parties at fault).

*Hunter Contr. Co. v. Superior Ct.*, 190 Ariz. 318, 947 P.2d 892 (Ct. App. 1997) (because contractor's negligence may be apparent without expert testimony, A.R.S. § 12–2602, which limits type of expert for required affidavit when suing a contractor, is unconstitutional).

*Toy v. Katz*, 191 Ariz. 73, 961 P.2d 1021 (Ct. App. 1997) (expert's opinion was that failure of attorney to establish and verify whether person or corporation was client prior to drafting sales agreement fell substantially below standard of practice in area at that time).

702.190 An expert may testify about behavioral characteristics of certain classes of persons, but may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

*State v. Boggs*, 218 Ariz. 325, 185 P.3d 111, ¶¶ 37–40 (2008) (during videotaped interrogation of defendant, detective accused defendant of lying; defendant claimed playing videotape to jurors violated his right to fair trial; court held that detective's accusations were part of interrogation technique and not for purpose of giving opinion testimony at trial, thus no error).

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶¶ 30–31 (2001) (expert testified about factors that affect ability of eyewitness to perceive, remember, and relate; trial court properly precluded expert from giving opinion of accuracy of particular eyewitness).

*State v. Lujan*, 192 Ariz. 448, 967 P.2d 123, ¶¶ 8–9, 11–13, 16, 20–21 (1998) (because defendant admitted playing with victim in swimming pool but denied ever touching her private parts, defendant was entitled to show victim was hypersensitive to interaction with adult males and thus may have mis-perceived her physical contact with defendant, and thus should have been allowed to introduce expert testimony about how victim's nearly contemporaneous sexual abuse by others may have caused victim to mis-perceive defendant's actions).

*State v. Reimer*, 189 Ariz. 239, 941 P.2d 912 (Ct. App. 1997) (when victim gave a different version when testifying, trial court erred in allowing officer to give opinion that victim was not lying when she gave version at time of assault).

702.195 Although an expert may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, a witness may disclose to jurors those facts that caused the witness not to believe a particular person.

*State v. Doerr*, 193 Ariz. 56, 969 P.2d 1168, ¶¶ 25–27 (1998) (defendant elicited testimony from officer that he did not believe defendant was truthful during questioning; state permitted to ask officer on rebuttal why he did not believe defendant was being truthful).

702.200 An expert may give an opinion of the defendant's state of mind at the time of the offense only when the defendant raises an insanity defense.

*State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 101–07 (2004) (because defendant's experts testified that defendant was in psychotic, dissociated state, trial court properly allowed state's

## ARIZONA EVIDENCE REPORTER

expert to testify on rebuttal that, in his opinion, defendant was “malingering” and that money and cocaine were likely motives for the killings).

*State v. Mott*, 187 Ariz. 536, 931 P.2d 1046 (1997) (defendant was charged with child abuse for failure to seek treatment for her child after child was injured while in care of defendant’s boyfriend; defendant wanted to introduce evidence that her condition as a battered woman caused her to form a “traumatic bond” with her boyfriend, caused her to feel hopeless and depressed and that she could not escape, interfered with her ability to sense danger and protect others, and caused her to believe what her boyfriend told her and to lie to protect him, all of which would preclude her from forming the necessary intent; court held this was merely another form of diminished capacity, which the legislature has refused to adopt, thus evidence was not admissible).

*State v. Wright*, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 6–7 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his “mental capacity was lowered and that he is a naive-type of person” and thus could not have mental state necessary to commit crime; court held that *State v. Mott* precluded evidence of diminished capacity defense).

702.205 Although an expert may not give an opinion about the defendant’s state of mind on the issue of *mens rea*, an expert may testify about the defendant’s behavior that the expert observed.

*State v. Wright*, 214 Ariz. 540, 155 P.3d 1064, ¶¶ 11–12, 15–17 (Ct. App. 2007) (defendant was charged with theft of means of transportation, which requires knowingly controlling vehicle with intent to deprive permanently; defendant sought to introduce expert testimony that his “mental capacity was lowered and that he is a naive-type of person” and thus could not have mental state necessary to commit crime; court concluded expert testimony was about defendant’s mental capacity generally and did not constitute observation evidence about defendant’s relevant behavioral characteristics bearing on defendant’s state of mind at time of offense, thus trial court properly precluded this evidence).

702.207 In a medical malpractice case, the plaintiff has the burden of proving its case, and thus there is no burden on the defendant to disprove anything, thus all the defendant’s expert witness need do is testify about other possible causes of the injury.

\* *Benkendorf v. Advanced Card. Spec.*, 228 Ariz. 528, 269 P.3d 704, ¶¶ 8–18 (Ct. App. 2012) (decedent died of intracranial hemorrhage; plaintiff’s expert witness gave opinion that negligently and adjusting Coumadin dosages caused death; trial court properly allowed defendant’s expert witness to testify that decedent’s age, hypertension, removal of kidney tumor, and history of stroke were possible causes of death).

702.210 The trier-of-fact is entitled to consider an expert witness’s opinion and may believe all, some, or none of the testimony, even though it is uncontradicted, and may give it only the weight to which it deems the opinion is entitled.

*In re Estate of Reinen*, 198 Ariz. 283, 9 P.3d 314, ¶¶ 9–12 (2000) (in medical malpractice case, trial court granted directed verdicts in favor of nurse and one doctor because second doctor testified that he would not have changed course of his treatment even if nurse and doctor had acted differently; because jurors were not obligated to believe testimony of testifying doctor, trial court erred in granting motion for directed verdict).

## OPINION AND EXPERT TESTIMONY

*State v. Gomez*, 211 Ariz. 111, 118 P.3d 626, ¶¶ 13–14 (Ct. App. 2005) (because trial court instructed jurors that they must determine facts from evidence presented, which consisted of testimony of experts and exhibits, and because trial court instructed jurors that they were not bound by expert testimony and should only give it weight it deserved, trial court did not abuse discretion in refusing defendant’s requested instruction that they could conduct their own examination of any evidence that had been admitted in evidence).

702.215 The trier-of-fact is entitled to make an independent evaluation of the facts and evidence that support the expert’s opinion.

*State v. Gomez*, 211 Ariz. 111, 118 P.3d 626, ¶¶ 10–12 (Ct. App. 2005) (trial court did not abuse its discretion in refusing defendant’s request that jurors be given magnifying glass to use to examine fingerprint cards admitted in evidence).

*State v. Ochoa*, 189 Ariz. 454, 943 P.2d 814 (Ct. App. 1997) (although officer testified he did not know whether shooting was gang-related and was unaware of any evidence that showed it was committed to benefit or advance any specific goal of the gang, this did not preclude jurors from finding shooting was gang-related).

702.217 The trial court had discretion in what to allow for the jurors to use in examining the items admitted in evidence.

*State v. Gomez*, 211 Ariz. 111, 118 P.3d 626, ¶¶ 10–12 (Ct. App. 2005) (trial court did not abuse its discretion in refusing defendant’s request that jurors be given magnifying glass to use to examine fingerprint cards admitted in evidence).

702.230 If the evidence is not derived from application of a scientific principle or process, but is instead the result of observing and identifying the way that certain things happen, there is no requirement that the party offering the evidence show general acceptance in the particular field in which it belongs.

*State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, ¶¶ 28–29 (2001) (although Arizona Supreme Court has held “general acceptance” test is not required for expert testimony about human behavioral characteristics, court stated expert testimony about behavioral characteristics of eyewitnesses is admissible if opinion “conforms to an appropriately scientific explanatory theory”; this statement was dicta).

*Logerquist v. McVey (Danforth)*, 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not testimony about some scientific principle, court held trial court erred in applying “generally accepted” standard to this testimony).

*State v. Boles*, 188 Ariz. 129, 933 P.2d 1197 (1997) (*Frye* analysis not needed when expert testified about his experiences with DNA matching).

*State v. Hummert*, 188 Ariz. 119, 933 P.2d 1187 (1997) (*Frye* analysis not needed when expert testified about his experiences with DNA matching).

*State v. Speers*, 209 Ariz. 125, 98 P.3d 560, ¶¶ 18–19 (Ct. App. 2004) (defendant was charged with 18 counts of sexual exploitation of minors based on computer images; trial court admitted as propensity evidence testimony from two second-grade students of alleged misconduct with

## ARIZONA EVIDENCE REPORTER

them; because testimony from expert witness about suggestive interview techniques was based on experience and observations about human behavior and not on scientific principles, trial court erred in excluding it based on trial court's conclusion that proposed testimony was not accepted by scientific community).

*State v. Lucero*, 207 Ariz. 301, 85 P.3d 1059, ¶¶ 16–21 (Ct. App. 2004) (expert's opinion that defendant was impaired by use of marijuana was based on knowledge and experience as forensic toxicologist and not on novel scientific principles, thus hearing was not necessary).

*State v. Fields (Medina)*, 201 Ariz. 321, 35 P.3d 82, ¶¶ 17–23 (Ct. App. 2001) (in SVPA proceeding, trial court required *Frye* hearing before admitting actuarial data upon which experts relied in rendering opinions on recidivism; court held that, although actuarial data was developed by others and not by person testifying, actuarial data was based on human behavior and not novel scientific principles, thus trial court erred in ordering *Frye* hearing).

*State v. Curry*, 187 Ariz. 623, 931 P.2d 1133 (Ct. App. 1996) (no need for a *Frye* hearing before admitting evidence of child sexual abuse accommodation syndrome (CSAAS)).

702.240 Expert testimony based on a novel scientific principle, formula, technique, or procedure developed or advanced by others is admissible if the scientific principle, formula, technique, or procedure has gained general acceptance in the particular scientific field in which it belongs, which means that the principle or process is generally accepted as being capable of doing what it purports to do; if the validity of a new scientific technique is in controversy in the relevant scientific community or if it is generally regarded as merely experimental, expert testimony based on its validity may not be admitted.

*Logerquist v. McVey (Danforth)*, 196 Ariz. 470, 1 P.3d 113, ¶¶ 30–32, 47, 53, 62 (2000) (because expert testimony on repressed memory caused by severe childhood trauma (including sexual abuse), dissociative amnesia, and retrieved memories was testimony about human behavior and not testimony about some scientific principle, court held trial court erred in applying “generally accepted” standard to this testimony).

*State v. Tankersley*, 191 Ariz. 359, 956 P.2d 486, ¶ 18 (1998) (*Frye* test does not require unanimity among scientists).

*State v. Esser*, 205 Ariz. 320, 70 P.3d 449, ¶¶ 11–13 (Ct. App. 2003) (court noted that alcohol breath testing has been found to be generally accepted in scientific community, thus it was defendant's burden to prove testing was not accorded general acceptance; court noted defendant's evidence was only that his expert and other authors of scientific articles disagreed with traditional theory of physiology underlying alcohol-breath interchange, and held this went only to weight of traditional evidence, rather than its admissibility).

*Wozniak v. Galati*, 200 Ariz. 550, 30 P.3d 131, ¶¶ 5, 9–12 (Ct. App. 2001) (defendant failed to present evidence that drug screen tests are not accepted in scientific community as way to identify presence of drugs; defendant's evidence went only to how accurate drug screen tests were to show presence of drugs, and that went to weight, not admissibility).

*State v. Garcia*, 197 Ariz. 79, 3 P.3d 999, ¶¶ 7–27 (Ct. App. 1999) (testing of stains on clothing showed presence of semen from more than one person; state offered expert testimony relying on formulae used to determine statistical probability of random DNA match; court concluded methodology and formulae used were accepted by general scientific community).

## OPINION AND EXPERT TESTIMONY

*State v. Claybrook*, 193 Ariz. 588, 975 P.2d 1101, ¶ 15 (Ct. App. 1998) (retroactive extrapolation to determine BAC at prior time is generally accepted in relevant scientific community).

702.250 When scientific evidence has been offered and received in other cases, if a party claims that the scientific principles in question have not gained general acceptance in the particular field, that party must introduce some authority to that effect before the trial court will require the other party to present evidence of general acceptance.

*State v. Lucero*, 207 Ariz. 301, 85 P.3d 1059, ¶¶ 4–11 (Ct. App. 2004) (defendant attacked evidence based on gas chromatography/mass spectrometry (GC/MS); court noted GC/MS technology had long been accepted by courts, and that absence of reported Arizona opinion expressly approving this method did not give defendant right to hearing).

702.280 Principles and theory underlying DNA matching and match criteria are generally accepted in the scientific community, and are therefore admissible.

*State v. Davolt*, 207 Ariz. 191, 84 P.3d 456, ¶¶ 67–68 (2004) (court noted that it had previously held DNA evidence based on product rule method of calculating probability of match acceptable when database satisfies *Frye* requirements, thus trial court did not abuse discretion in denying defendant's motion to preclude DNA evidence).

*State v. Lehr*, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 16–19 (2002) (trial court took judicial notice that principles and theories underlying DNA analysis in forensic labs are generally accepted in scientific community and that RFLP method in particular met general acceptance test).

*State v. (Van) Adams*, 194 Ariz. 408, 984 P.2d 16, ¶¶ 31–33 (1999) (for polymerase chain reaction (PCR) technology, Arizona has recognized general scientific acceptance of RFLP, RAPD, and reverse dot blotting technology).

*State v. Sharp*, 193 Ariz. 414, 973 P.2d 1171, ¶ 24 (1999) (Arizona Supreme Court has already held RFLP method of DNA analysis is generally accepted in Arizona and is reliable, thus trial court did not need to hold a *Frye* hearing).

*State v. Tankersley*, 191 Ariz. 359, 956 P.2d 486, ¶ 19 (1998) (PCR technology and DQ-alpha marking system are generally accepted in relevant scientific community).

*State v. Hummert*, 188 Ariz. 119, 933 P.2d 1187 (1997) (court noted recent scientific analysis has shown other methods of quantifying DNA matching have gained scientific acceptance).

*State v. Marshall*, 193 Ariz. 547, 975 P.2d 137, ¶ 7 (Ct. App. 1998) (court held issue of "match window" goes to weight and not admissibility, and also noted that expert testimony was that "match window" of plus or minus 2.5% used by FBI was generally accepted in community).

702.290 DNA random match probability calculations and opinions based on those calculations are generally accepted in the relevant scientific community.

*State v. Hummert*, 188 Ariz. 119, 933 P.2d 1187 (1997) (court noted recent scientific analysis has shown other methods of quantifying DNA matching have gained scientific acceptance).

*State v. Bigger*, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 23–34 (Ct. App. 2011) (state offered testimony from expert witnesses about DNA from radio knob in victim's car using short tandem repeats (STR) and statistics using random man not excluded (RMNE) and likelihood ratio (LR) methods; defendant contended there was no generally accepted method of generating statistics).

## ARIZONA EVIDENCE REPORTER

for “low-level mixture” or “low-copy number (LCN)” situations; court noted LR, RMNE, and modified product rule are DNA interpretations generally accepted in relevant scientific community, and thus held trial court properly admitted expert witness testimony).

*State v. Marshall*, 193 Ariz. 547, 975 P.2d 137, ¶¶ 9–11 (Ct. App. 1998) (because National Research Council withdrew its earlier suggestion that only modified ceiling method be used and now endorses unrestricted product rule, and because majority of cases from other jurisdictions have approved that rule, it appears unrestricted product rule is now generally accepted in relevant scientific community).

**702.295** If a particular technique has gained acceptance in the scientific community, the accuracy of its implementation in a particular case is subject to ordinary foundational considerations; if claimed deficiencies in procedure are sufficiently serious, trial court should not admit evidence; otherwise, if trial court concludes claimed deficiencies in procedure do not make this evidence inadmissible, then claimed deficiencies go to weight of the evidence of the procedure, and the jurors must be permitted at trial to hear evidence of procedure.

*State v. Montañño*, 204 Ariz. 413, 65 P.3d 61, ¶ 69 (2003) (defendant’s claim that DNA is “magic” and “bogus,” that one witness had judgment against him, that *USA Today* ran article calling British DNA database “flawed,” and that DNA evidence was not overwhelming in this case, were merely attacks on weight of evidence, which was within province of jurors).

*State v. Lehr*, 201 Ariz. 509, 38 P.3d 1172, ¶¶ 16–31 (2002) (in consolidated action, judge holding consolidated hearing took judicial notice of fact that principles and theories underlying DNA analysis in forensic labs are generally accepted in scientific community and that RFLP method in particular met general acceptance test, and then held claimed deficiencies in laboratory procedure did not preclude admission of evidence; at trial, trial judge precluded defendant from cross-examining witness about laboratory procedure, ruling this would be re-litigating issues resolved at consolidated hearing; court held jurors must assess weight of evidence of laboratory procedure, and thus held trial judge erred in precluding this evidence).

*State v. (Van) Adams*, 194 Ariz. 408, 984 P.2d 16, ¶ 34 (1999) (for polymerase chain reaction (PCR) technology, Arizona has recognized general scientific acceptance of RFLP, RAPD, and reverse dot blotting technology; challenges to application of these techniques by Arizona Department of Public Safety crime lab went to weight, not admissibility).

*State v. Tankersley*, 191 Ariz. 359, 956 P.2d 486, ¶¶ 20–21 (1998) (defendant challenged lack of written protocols and current proficiency testing, excessive number of cycles run on thermal cycler, temperature regulation problems, failure to quantify sample’s DNA before amplification, and reporting of results despite evidence of contamination).

*State v. Bigger*, 227 Ariz. 196, 254 P.3d 1142, ¶¶ 35–39 (Ct. App. 2011) (state offered testimony from expert witnesses about DNA from radio knob in victim’s car using short tandem repeats (STR) and statistics using random man not excluded (RMNE) and likelihood ratio (LR) methods; defendant contended expert witnesses’ formulas were flawed because they were based on partial information; court held this went to weight of evidence and not its admissibility).

*State v. Lucero*, 207 Ariz. 301, 85 P.3d 1059, ¶¶ 12–15 (Ct. App. 2004) (defendant attacked evidence based on gas chromatography/mass spectrometry (GC/MS); court noted GC/MS technology had long been accepted by courts, and that defendant’s challenges went only to test procedures and interpretations of test results).

## OPINION AND EXPERT TESTIMONY

*State v. Morgan*, 204 Ariz. 166, 61 P.3d 460, ¶¶ 27–33 (Ct. App. 2002) (claim that expert did not use sufficiently large sample for DNA testing did not go to general acceptance but instead to accuracy of testing procedure; this went to weight and not admissibility of evidence).

*Wozniak v. Galati*, 200 Ariz. 550, 30 P.3d 131, ¶¶ 5, 9–12 (Ct. App. 2001) (defendant failed to present evidence that drug screen tests are not accepted in scientific community as way to identify presence of drugs; defendant's evidence went only to how accurate drug screen tests were to show presence of drugs, and that went to weight, not admissibility).

702.300 All references to polygraph tests are inadmissible for any purpose in Arizona, absent a stipulation of the parties.

*State v. Hoskins*, 199 Ariz. 127, 14 P.3d 977, ¶¶ 68–69 (2001) (witness had been willing to take polygraph test, and defendant sought to question officers about their decision not to give witness polygraph test, contending this showed officers did not consider witness to be reliable; court held any testimony about polygraph tests was inadmissible, and declined invitation to revisit what it considered was a settled area of law).

702.330 Under Rule 1(D)(4), Uniform Rules of Practice for Medical Malpractice Cases, if a party lists a witness for one area, that should not preclude the party from using that witness to testify in another area.

*Perguson v. Tamis*, 188 Ariz. 347, 937 P.2d 347 (Ct. App. 1996) (plaintiff listed first doctor as causation witness and second doctor as standard of care witness; trial court erred in precluding plaintiff from having second doctor, rather than first doctor, give opinion on causation).

April 10, 2013

## ARIZONA EVIDENCE REPORTER